U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 26Aug2002

OALJ NO.: 1999-BLA-01340

BRB NO.: 00-1083 BLA

In the Matter of

ROY R. HALL
Claimant

v.

DOMINION COAL CORPORATION
Employer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-in-Interest

Appearances:

Roy R. Hall, Big Rock, Virginia, *pro se*

Ronald E. Gilbertson, Esq. (Bell, Boyd & Lloyd), Washington, D.C., for the Employer

Sarah M. Hurley, Esq.; Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; and Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice (U.S. Department of Labor, Office of Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs

Before: Daniel F. Sutton
Administrative Law Judge

DECISION AND ORDER ON REMAND AWARDING BENEFITS

I. Statement of the Case

This matter, which arises from a claim for benefits originally filed on August 25, 1995 by Roy R. Hall (the Claimant) against the Dominion Coal Corporation under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended (the Act), 30 U.S.C. §901 *et seq.*, is before me on remand from the Benefits Review Board (the Board). *Hall v. Dominion Coal Corp.*, BRB No. 00-1083 BLA (October 10, 2001) (unpublished). The Act provides for the payment of benefits to coal miners who are totally disabled within the meaning of the Act due to pneumoconiosis, and to the survivors of a coal miner whose death is due to pneumoconiosis. 30 U.S.C. §901(a).

On April 8, 1996, the Office of Workers' Compensation Programs (OWCP) made an initial determination that the Claimant is eligible for benefits under the Act. Director's Exhibit "DX" 26. The Employer contested its liability and requested a formal hearing before the Office of Administrative Law Judges (OALJ). DX 28. Following a hearing, Administrative Law Judge Frederick D. Neusner issued a decision and order denying benefits on February 10, 1997. DX 42. Judge Neusner determined that the Claimant had successfully established that he suffers from pneumoconiosis, but that he failed to prove that he has a totally disabling respiratory or pulmonary impairment. *Id.*, Decision and Order at 6. The Claimant appealed to the Board which affirmed Judge Neusner's decision and order. *Hall v. Dominion Coal Co.*, No. 97-0776 BLA (January 28, 1998) (unpublished); DX 52. On February 23, 1998, the Claimant filed a motion for reconsideration, DX 54, which the Board denied on March 25, 1998. DX 55.

Within a year of the Board's decision, the Claimant filed timely requests, accompanied by additional evidence, for modification of the prior denial of his claim. DX 56, 62. The District Director, OWCP denied the modification requests, DX 59, 67, and the Claimant requested a formal hearing before OALJ. DX 71, 72. The parties waived their right to a hearing, and I considered the modification request based on the written record after allowing the parties an opportunity to offer additional documentary evidence and written argument. After noting that a prior determination on a claim under the Act may be modified upon a showing of either a change in conditions or a mistake in a determination of fact, I found no mistake in Judge Neusner's determination on the evidence before him that the Claimant failed to establish that he suffers from a totally disabling respiratory or pulmonary impairment. Decision and Order at 4. I also found that newly submitted x-ray and CT scan evidence was insufficient to establish the existence of complicated pneumoconiosis and entitlement to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). Decision and Order at 8-9. However, I found that newly submitted blood gas study and medical opinion evidence was sufficient to establish total disability pursuant to 20 C.F.R.

§718.204(c)(1) (2000)[1] and, therefore, a change in conditions. Decision and Order at 10-12. I next considered all the evidence of record and found that the Claimant had established that he is totally disabled due to pneumoconiosis arising out of coal mine employment. Decision and Order at 12-13. Based on my findings that the Claimant had established a change in conditions, I granted his modification request and awarded him benefits to be paid by the Employer commencing on April 1, 1998, the month in which the modification request was filed. Decision and Order at 13-14.

The Employer appealed to the Board, excepting to my findings that the newly submitted blood gas study and medical opinion evidence was sufficient to establish total disability and, therefore, a change in conditions. The Claimant responded, urging the Board to affirm my award of benefits on his request for modification. In the alternative, the Claimant asserted that I had improperly excluded evidence which he had offered for the purpose of discrediting a new medical opinion that the Employer had introduced from Dr. Castle.[2] The Claimant further contended that I erred in finding that he failed to establish the existence of complicated pneumoconiosis and entitlement to the section 411(c)(3) irrebuttable presumption of total disability due to pneumoconiosis. Finally, the Claimant contended that I erred in finding that no mistake in a determination of fact in Judge Neusner's prior finding that the evidence did not establish total disability. The Director, OWCP also responded to the Employer's appeal, essentially agreeing with the Claimant's position that I erroneously concluded that there was no mistake in any prior determination of fact. Nonetheless, the Director urged the Board to affirm my award of benefits

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[1] Subsequent to my adjudication of the modification request, the Department of Labor amended the regulations implementing the Act effective January 19, 2001. 65 Fed. Reg.79,920-80,107 (December 20, 2000). The amendments recodified the applicable criteria for determining the existence of a totally disabling respiratory or pulmonary impairment from 20 C.F.R. §718.204(c)(1)(i)-(iv) (2000) to 20 C.F.R. §718.204(b)(2)(i)-(iv) (2001) but did not effect any substantive changes to the criteria. In a lawsuit brought the mining industry, the United States District Court granted the Secretary of Labor's motion for summary judgment, denying all challenges to the new regulations. *Nat'l Mining Ass'n v. Chao*, 160 F. Supp.2d 47 (D.D.C. 2001). Based on the Court's decision, the Board held that the parties' arguments regarding the impact of the new regulations on this case were moot. *Hall v. Dominion Coal Corp.*, BRB No. 00-1083 BLA (October 10, 2001) (unpublished), slip opinion at 2, n.1. Thereafter, the Court of Appeals for the District of Columbia Circuit upheld most of the challenged regulations but ruled that certain regulations, none of which are relevant to consideration of this case on remand, could not be applied retroactively. *National Mining Ass'n. v. Dep't. of Labor*, 292 F.3d 849 (2002).

[2] The excluded evidence related to the Claimant's allegation that the technician who conducted pulmonary function the testing for Dr. Castle lacked a required state license. I granted the Employer's motion to exclude, finding that evidence regarding the state licensing of the technician to be irrelevant to the question of whether the test procedures conformed to the regulatory standards promulgated under the Act. Order Granting Motion to Exclude issued March 28, 2000.

and my finding that the newly submitted blood gas study and medical opinion evidence is sufficient to establish total disability and, therefore, a change in conditions.

As an initial matter, the Board noted that contrary to my determination that the law of the United States Court of Appeals for the Fourth Circuit would apply because the Claimant's coal mine employment occurred in Virginia, a review of the record indicates that the Claimant's most recent coal mine employment was in Kentucky which is within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. The Board further noted that although the Sixth Circuit has declined to express an opinion as to the proper forum or forums when a claimant is exposed to coal dust in more than one circuit; *see Danko v. Director, OWCP*, 846 F.2d 366, 368 n. 2 (1988); it had subsequently held in *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*Shupe*) that the law of the circuit in which the miner most recently performed his or her coal mine employment would apply. Slip opinion at 5, n.4. The Board further noted that where a miner has worked in more than one circuit, and the laws of those circuits are compatible, it is unnecessary to determine which circuit's law applies. *Id.*

On the merits, the Board first affirmed, as unchallenged on appeal, my finding that the Claimant had established the existence of pneumoconiosis arising out of coal mine employment as well as my findings that the only newly submitted pulmonary function study was insufficient to demonstrate total disability pursuant to 20 C.F.R. §718.204(c)(1) (2000), as revised at 20 C.F.R. §718.204(b)(i) (2001), and that there was no evidence of cor pulmonale with right-sided congestive heart failure to demonstrate total disability pursuant to 20 C.F.R. §718.204(c)(3) (2000), as revised at 20 C.F.R. §718.204(b)(iii) (2001). Slip opinion at 7, n.9. With regard to the pulmonary function study evidence, the Board held that I did not abuse my discretion in excluding the Claimant's evidence pertaining to the technician's license or in admitting the new report from Dr. Castle. Slip opinion at 8, n.11. The Board also affirmed my finding that the Claimant cannot invoke section 411(c)(3)'s irrebuttable presumption of total disability due to pneumoconiosis because a preponderance of the relevant newly submitted x-ray and CT scan evidence does not establish the existence of complicated pneumoconiosis. Slip opinion at 7. Next, the Board concluded that I has reasonably given greater weight to the new medical opinion from the Claimant's treating physician, Dr. Forehand, and it affirmed, as rational and supported by substantial evidence, my findings that the Claimant had established total respiratory disability pursuant to 20 C.F.R. §718.204(c), as revised at 20 C.F.R. §718.204(b)(2) (2001), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000), as revised at 20 C.F.R. §718.204(c) (2001). Slip opinion at 11.

Finally, the Board observed that in determining that there was no mistake in a prior determination of fact, I "did not consider whether the evidence of record, including the newly submitted evidence, established that claimant has been totally disabled all along and, therefore, should not have been denied benefits previously." Slip opinion at 13, citing *Consolidation Coal Corp. v. Worrell*, 27 F.3d 227, 230 (6th Cir. 1994). Consequently, the Board vacated both my finding of no mistake in a determination of fact and my finding of a change in conditions, and it remanded the case with instructions to "reconsider whether the evidence of record establishes that

'the ultimate fact (i.e., no respiratory disability) was wrongly decided . . . ." *Id.* (quotations in original). In addition, the Board vacated my determination as to the onset date for benefit payment since, as discussed in greater detail below, my finding on remand, as to whether modification is based on a mistake in a determination or rather on a change in conditions, will be determinative of the date from which benefits will be payable. *Id.*

Upon reconsideration of the relevant evidence in accordance with the Board's instructions, I conclude for the reasons discussed below that the Claimant has established that the ultimate fact of total disability due to pneumoconiosis was wrongly decided in the prior case. Accordingly, I will grant the Claimant's modification request on the basis of a mistake in a determination of fact, and I will award him benefits to be paid by the Employer from the month in which his claim was originally filed.

II. Findings of Fact and Conclusions of Law On Remand

A. Mistake in a Determination of Fact or Change in Conditions

I agree with the Board that I focused too narrowly in my earlier decision on the question of whether there was any specific mistake in a factual determination in Judge Neusner's denial of benefits. As the Sixth Circuit observed in *Worrell*,

> Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 922 (the statute underlying 20 C.F.R. § 725.310), "vest[s] a deputy commissioner with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256, 92 S.Ct. 405, 407, 30 L.Ed.2d 424 (1971). If a claimant merely alleges that the ultimate fact (disability due to pneumoconiosis) was wrongly decided, the deputy commissioner may, if he chooses, accept this contention and modify the final order accordingly. "There is no need for a smoking-gun factual error, changed conditions, or startling new evidence."

Worrell, 27 F.3d at 230, quoting *Jessee v. Director, OWCP*, 5 F.3d 723, 725 (4th Cir. 1993).[3] In addition to reconsidering in accordance with *Worrell* the broad question of whether there was a mistake in the ultimate determination of fact that total disability due to pneumoconiosis was not proved, the Board has directed me to reconsider my finding that there was no specific factual error in Judge Neusner's determination that total disability was not established:

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[3] In accordance with the Board's decision in *Shupe*, I have applied the law of the Sixth Circuit since the record shows that the Claimant's last coal mine employment was in Kentucky, not Virginia, although, as the Board noted, there is no material difference between Fourth Circuit and Sixth Circuit precedent, at least as far as is relevant to the issues to be addressed on remand.

> In reconsidering whether a mistake in a determination in fact was demonstrated in accordance with the standard enunciated in *Worrell, supra,* on remand, the administrative law judge should also reconsider his determination that no specific factual error was committed by Judge Neusner in determining that the evidence of record as it previously existed before him, did not establish total disability. Dr. Forehand's 1995 qualifying blood gas study results drawn during exercise, Director's Exhibits 11, 13, were rebutted in the original record by Dr. Sargent's non-qualifying blood gas study exercise results, *see* Director's Exhibit 32. However, Dr. Sargent's blood gas study exercise results were drawn after exercise, *see* Director's Exhibit 38 at 10. The relevant quality standards under 20 C.F.R. §718.105(b)(2000), *see also* 20 C.F.R. §725.2(c), state that "if an exercise blood-gas test is administered, blood shall be drawn during exercise." On modification, Dr. Forehand criticized Dr. Sargent's blood gas study exercise results due to the fact that they were from a blood sample drawn after exercise as opposed to during exercise, *see* Director's Exhibit 70; Claimant's Exhibit 1. Thus, while the quality standards set forth in Section 718.105 (2000) for blood gas studies are not mandatory, the administrative law judge should, as claimant contends, consider and use them as guidelines, *see Orek v. Director, OWCP*, 10 BLR 1-51 (1987)(Levin, J., concurring), in reconsidering whether a mistake in a determination of fact was committed by Judge Neusner regarding Dr. Sargent's blood gas study exercise results. In addition, the administrative law judge should consider the fact that, while Dr. Fino found on modification that Dr. Forehand's qualifying blood gas study results did not make "clinical sense," in part, because Dr. Sargent's blood gas studies yielded "higher values at rest," *see* Employer's Exhibit 9, the qualifying blood gas study results from Dr. Forehand were drawn during exercise, not at rest, *see* Director's Exhibits 11, 13, 70; Claimant's Exhibit 1.

Slip opinion at 13-14, n.13. The Board's observations are well-taken. Dr. Forehand has consistently obtained arterial blood gas results during exercise which qualify to establish a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(c)(2) (2000) as revised at 20 C.F.R. §718.204(b)(i) (2001). DX 13 (October 24, 1995); DX 70 (February 4, 1998). In his most recent report, Dr. Forehand reviewed the results of the 1995 and 1998 arterial blood gas studies and noted that the Claimant's arterial oxygen level was normal before exercise on both dated but dropped during exercise. He further reported explained that an additional sample of arterial blood was drawn two minutes after termination of exercise demonstrated that the Claimant's arterial oxygen rapidly returned to the normal range after falling abnormally low during exercise. DX 70, February 4, 1998 Report at 1-2. Based on his review of the medical test results and the Claimant's occupational history, Dr. Forehand concluded,

> An X-ray of the chest was taken on Tuesday, February 3 and reveals extensive pneumoconiosis (r/r, 2/3, A, ax). Taking into consideration 25 years as a roof bolt operator, a chest X-ray demonstrating stage 2 pneumoconiosis, and an abnormal

> drop in arterial oxygen during exercise (seen on two occasions over two years apart) it is not difficult to conclude that Mr. Hall has a totally disabling respiratory impairment of a gas-exchange nature which arose from a job in underground coal mining known to have a higher-than-usual risk for developing coal worker's pneumoconiosis.

Id. at 2. Judge Neusner found that Dr. Forehand's opinion that the Claimant has a totally disabling, exercise-induced pulmonary impairment was contradicted by the arterial blood gas results obtained "before and after exercise" by Dr. Sargent. DX 42 at 5. Noting that Dr. Sargent had opined that Dr. Forehand's 1995 blood gas study results were likely attributable to an acute respiratory or pulmonary condition which subsequently resolved, Judge Neusner further found that the differences between the arterial blood gas results obtained by Dr. Forehand in 1995 and those obtained by Dr. Sargent in 1996 showed an improvement in the Claimant's condition and constituted "persuasive evidence" that the Claimant is not disabled by pneumoconiosis. *Id.* at 6. The problem, of course, with Dr. Sargent's analysis, and consequently with Judge Neusner's finding, is their implicit assumption that the 1995 and 1996 arterial blood gas studies were comparable in terms of how they were conducted and what they measured, when in reality, as the Board has pointed out, the two studies differed significantly. Dr. Sargent only measured blood oxygen levels at rest and *after* exercise, while Dr. Forehand additionally drew his results *during* exercise, which is the protocol specified in the regulatory quality standards at 20 C.F.R. §718.105(b)(2001).[4] Given this significant difference in test methodology, I conclude that the evidence does not show that the Claimant's condition improved after the 1995 study as found by Judge Neusner. Additionally, I now find on reconsideration of the evidence that there was a mistake in Judge Neusner's determination that total respiratory disability was not established by either arterial blood gas study evidence pursuant to 20 C.F.R. §718.204(c)(2) or medical opinion evidence pursuant to 20 C.F.R. §718.204(c)(4). I base this finding first, on the fact that the regulations specifically require that a claimant be offered an exercise blood gas study with blood drawn *during* exercise, unless medically contraindicated, if a study at rest does not produce qualifying results, and second, on the Board's holding in *Coen v. Director, OWCP*, 7 BLR 1-30, 1-31 (1984) that it is rational to give greater weight to exercise arterial blood gas results.

My conclusion that there was a mistake in the prior total disability determination is reinforced upon reconsideration of the new evidence submitted in connection with the modification request. That is, Dr. Forehand's February 1998 arterial blood gas study again produced qualifying results during exercise, and he provided the well-reasoned and documented opinion quoted above that the Claimant is permanently and totally disabled due to pneumoconiosis. I also find for the reasons set forth in my earlier decision that Dr. Forehand's medical opinion is not outweighed by the contrary opinions offered by the Employer from Drs.

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[4] The amendments to the regulations which became effective on January 19, 2001 did not alter section 718.105(b).

Fino and Castle.[5] After reconsidering the relevant evidence, I now conclude that the evidence does not establish a change in conditions since the credited medical evidence shows that the Claimant has been totally disabled all along. Therefore, I now conclude upon reconsideration of the evidence of record that the ultimate fact of total disability due to pneumoconiosis was wrongly determined.

B. Date for Commencement of Benefit Payments

The Board noted that subsequent to the issuance of my earlier decision and order, the regulations were revised to provide specific guidelines for determining the onset date for benefits awarded based on a modification petition. Slip opinion at 12, citing 20 C.F.R. §725.503 (2001). As the Board observed, if a claim is awarded on modification based on a finding that there was a mistake of fact, the revised regulation specifies that benefits are payable beginning with the month of onset of total disability due to pneumoconiosis arising out of coal mine employment, but where the evidence does not establish the month of onset, benefits are payable beginning with the month during which the claim was filed. 20 C.F.R. §725.503(b) and (d)(1). The evidence of record shows that the Claimant has been totally disabled due to pneumoconiosis since at least October 25, 1995 when Dr. Forehand first obtained qualifying arterial blood gas measurements during exercise. DX 13. However, the date of the first medical evidence indicating total disability does not establish the onset date; rather, such evidence only indicates that the miner became totally disabled at some point prior to when such medical tests revealed the existence of a totally disabling respiratory or pulmonary impairment. *Tobrey v. Director, OWCP*, 7 BLR 1-407, 1-409 (1984); *Hall v. Consolidation Coal Co.*, 6 BLR 1-1306, 1-1310 (1984). Since there is no evidence in the record establishing that the Claimant was not totally disabled due to pneumoconiosis when he first filed his claim or that he first became totally disabled at some point after the filing date, I will order that benefits be paid pursuant to sections 725.503(b) and (d)(1) from August 1, 1995, the month in which he originally filed his claim for benefits.

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[5] In my earlier decision, I found Dr. Fino's dismissive treatment of Dr. Forehand's qualifying arterial blood gas results during exercise unpersuasive. In this regard, I found Dr. Fino's characterization of the results as showing a "slight" drop in arterial pO_2 to be reflective of either a failure to appreciate the fact that the results dropped sufficiently to qualify for a finding of total disability under the applicable regulatory standards or a cursory review of the test data. In addition, I found Dr. Fino's assessment that the exercise test results make "no clinical sense" to less carefully reasoned than the explanation offered by Dr. Forehand that a drop in arterial pO_2 with exercise is indicative of a disabling respiratory impairment. Decision and Order at 11-12. I similarly discounted Dr. Castle's consultative opinion because he completely ignored arterial blood gas results, relying instead on his non-qualifying pulmonary function study. The Board upheld my evaluation and weighing of the medical evidence; slip opinion at 11; and I find no reason after reconsidering the relevant evidence on remand to alter my previous finding that Dr. Forehand's medical opinion is entitled to greater weight than the contrary opinions from Drs. Fino and Castle.

III. Order

The request filed by Roy R. Hall for modification of the prior denial of his claim GRANTED. Dominion Coal Company, as the responsible operator, shall pay the Claimant all benefits to which he is entitled under the Act, as augmented by his dependent wife, Molly Carol Lester, commencing August 1, 1995.

SO ORDERED.

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Daniel F. Sutton
Administrative Law Judge

Boston, Massachusetts
DFS:dmd

NOTICE OF APPEAL RIGHTS

Pursuant to 20 C.F.R. §725.481, any party dissatisfied with this Order may appeal it to the Benefits Review Board within thirty days from the date of this decision by filing a Notice of Appeal with the Benefits Review Board, ATTN: Clerk of the Board, P.O. Box 37601, Washington, DC 20013-7601. A copy of a notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits, Francis Perkins Building, Room N-2117, 200 Constitution Avenue, N.W., Washington, D.C. 20210.